Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ADMIRAL STANSFIELD TURNER, PETITIONER

v.

DONALD S. JORDAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Director of Central Intelligence is absolutely immune from personal damages liability for exercising his official authority to dismiss a CIA employee pursuant to Section 102(c) of the National Security Act of 1947, as amended, 50 U.S.C. 403(c).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	13
Appendix A	1a
Appendix B	24a
Appendix C	26a
Appendix D	28a
Appendix E	30a
Appendix F	31a

TABLE OF AUTHORITIES

Cases:

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362, cert. denied, 421 U.S. 992	12
Barr v. *Matteo*, 360 U.S. 564	9
Bradley v. *Fisher*, 80 U.S. (13 Wall.) 335	8
Butz v. *Economou*, 438 U.S. 478	5, 8, 10, 12, 13
Harlow v. *Fitzgerald*, cert. granted, No. 80-945 (June 22, 1981)	8, 13
Howard v. *Lyons*, 360 U.S. 593	9
Imbler v. *Pachtman*, 424 U.S. 409	9, 10
Mt. Healthy City School District v. *Doyle*, 429 U.S. 274	4, 6
Nixon v. *Fitzgerald*, cert. granted, No. 79-1738 (June 22, 1981)	8, 13
Phillippi v. *CIA*, 546 F.2d 1009	12

Cases—Continued

Scheuer v. *Rhodes*, 416 U.S. 232 10
Snepp v. *United States*, 444 U.S. 507 8
Spalding v. *Vilas*, 161 U.S. 483 9
Stein v. *Department of Justice*, No. 79-1615 (7th Cir. Oct. 19, 1981) 12
Totten v. *United States*, 92 U.S. 105 11

Constitution, statute and regulations:

United States Constitution:
First Amendment 4, 5, 7, 11
Fifth Amendment 2, 4, 5
Freedom of Information Act, 5 U.S.C. 552 12
National Security Act of 1947, 50 U.S.C. 40 *et seq.*:
Section 102(c), 50 U.S.C. 403(c) 2, 4, 5, 7, 9, 10
Section 103(d)(3), 50 U.S.C. 403(d)(3) 5, 10
28 U.S.C. 1291 6
28 U.S.C. 1292(b) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Admiral Stansfield Turner, the former Director of Central Intelligence, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. B, *infra*, 24a-25a) is not reported. The opinion of the district court (App. A, *infra*, 1a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 24a-25a) was entered on June 12, 1981. On September 1, 1981, Justice Brennan extended the time

for filing a petition for a writ of certiorari to and including November 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 102(c) of the National Security Act of 1947, as amended, 50 U.S.C. 403(c), provides:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

STATEMENT

1. On October 27, 1978, respondent, a former employee of the Central Intelligence Agency (CIA), filed this action in the United States District Court for the District of Columbia, alleging that he was discharged from the CIA in violation of his rights under the First and Fifth Amendments, CIA personnel regulations, and his employment contract with the Agency. Respondent sought declaratory and injunctive relief against the CIA and against petitioner in

his official capacity as the Director of Central Intelligence. In addition, respondent sought $250,000 in damages from petitioner in his individual capacity.

Respondent was employed for 26 years in the Domestic Collection Division of the CIA (App. A, *infra*, 1a).[1] Beginning in 1973, respondent lodged numerous protests with various CIA officials concerning the agency's personnel practices, particularly with regard to the use of secret personnel evaluations that were not disclosed to the employees as required by CIA regulations (C.A. App. 10-11). The Agency investigated respondent's grievances on several occasions (C.A. App. 11-13). In his complaint in this case, respondent alleged that, in reprisal for his criticisms, the CIA began a course of mistreating him, which included a short-term suspension in 1975 and certain other actions damaging to respondent's relationships with his intelligence sources (C.A. App. 11-13). In July 1977, respondent directed a memorandum detailing all of his past complaints to one of petitioner's aides (C.A. App. 13).

In November 1977, respondent was notified that his name was on a list of approximately 200 employees scheduled to be terminated in March 1978 as part of a reduction-in-force (RIF) (C.A. App. 14). Apparently believing that his inclusion in the RIF was in retaliation for his previous complaints, respondent, on November 15, 1977, sent to petitioner, and made public, a telegram repeating his charges of improper personnel practices and asserting that his scheduled dismissal under the RIF constituted

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[1] The Domestic Collection Division gathers information of intelligence value from American citizens who travel abroad (C.A. App. 9; "C.A. App." refers to the appendix in the court of appeals). Division personnel have Top Secret security clearance and have access to classified information.

reprisal (C.A. App. 14, 28-33). Thereafter, on December 5, 1977, three CIA employees allegedly appeared at respondent's office and advised him that petitioner had terminated respondent's employment, effective immediately, because of the telegram (C.A. App. 14). Respondent alleged, and petitioner and the CIA admitted, that shortly thereafter a CIA representative, in response to a press inquiry, gave an incorrect explanation of the reasons for respondent's discharge (App. A, *infra*, 2a).

2. In the district court, petitioner moved for summary judgment, contending, *inter alia*, that he was entitled to absolute immunity—or, at the very least, to qualified immunity as a matter of law—with regard to respondent's claim for damages.[2] In support of his assertion of absolute immunity, petitioner contended that allowing the CIA Director to be subject to suit for damages based on his personnel decisions would be inconsistent with the broad discretion afforded the Director under 50 U.S.C. 403(c) to "terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States * * *." In addition, petitioner argued that the position of Director of Central Intelligence involves

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[2] In addition to petitioner's immunity defense, both petitioner and the CIA sought summary judgment on the grounds: (1) that judicial review of respondent's nonconstitutional claims was precluded by 50 U.S.C. 403(c); (2) that the First Amendment did not provide a basis for review because the "speech" that respondent alleged was the basis for his discharge was not constitutionally protected under the balancing test of *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 284 (1977), in light of the unique nature of the CIA employer-employee relationship; and (3) that the Fifth Amendment did not afford a basis for review because respondent had not shown either a property or a liberty interest entitling him to a pre-termination hearing.

the performance of "special functions" (*Butz* v. *Economou*, 438 U.S. 478, 508 (1978)) warranting the protection of absolute immunity. Petitioner pointed out that the function of the CIA is to collect and evaluate highly sensitive intelligence information and that, under 50 U.S.C. 403(d)(3), the Director is made "responsible for protecting intelligence sources and methods from unauthorized disclosure." Petitioner argued that, in order to preserve the secrecy and security of intelligence sources and methods, the Director might be forced to retain as CIA employees individuals who would otherwise have been terminated, because a requirement that the Director show good faith and reasonableness in order to avoid exposure to personal damages liability would almost invariably compromise confidential information.

The district court granted summary judgment in part and denied it in part (App. A, *infra*, 1a-23a; App. C, *infra*, 26a-27a). In particular, the court rejected summary judgment on petitioner's official immunity claims (App. A, *infra*, 20a-23a).[3] Al-

[3] The district court also held that review of respondent's nonconstitutional claims was not barred by 50 U.S.C. 403(c) (App. A, *infra*, 4a-8a). With regard to respondent's constitutional claims, petitioner and the CIA had conceded that judicial review is available where an employee demonstrates that he may have been discharged for a reason that violates the Constitution. As to respondent's First Amendment claim, the court assumed that respondent's speech was constitutionally protected, and held that summary judgment was not appropriate "at this stage" because of the inadequacy of the record (*id.* at 14a-20a). However, the court granted relief with respect to respondent's Fifth Amendment claims, holding that respondent failed to demonstrate that the defendants had infringed any Fifth Amendment property or liberty interest (*id.* at 8a-14a).

though it noted that absolute immunity may be proper "[w]here defense of a constitutional tort action requires the disclosure of classified information" (*id.* at 21a), the court held that, because petitioner had acknowledged that it was not necessary to resort to classified information in order to defend his dismissal of respondent, petitioner was not entitled to absolute immunity in the particular circumstances of this case (*ibid.*). Additionally, the court found that the issue of qualified immunity "cannot now be resolved" because the pertinent facts had not been sufficiently developed (*id.* at 22a-23a).[4]

On petitioner's appeal from the denial of absolute immunity,[5] the court of appeals affirmed without opinion (App. B, *infra*, 24a-25a).[6]

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[4] The court noted, in this regard, that the reasons for respondent's discharge were not in the record (App. A, *infra*, 22a).

[5] On November 18, 1980, the district court certified the case for interlocutory appeal pursuant to 28 U.S.C. 1292(b) (App. D, *infra*, 28a-29a). On March 30, 1981, the court of appeals denied an application by petitioner and the CIA for permission to appeal the district court's interlocutory rulings (App. E, *infra*, 30a), and it dismissed the appeal as to all issues with the exception of petitioner's absolute immunity claim, which the court held was appealable as a final collateral order under 28 U.S.C. 1291 (App. F, *infra*, 31a-32a).

[6] While petitioner's appeal was pending, the case against the CIA continued in the district court. At this point, the district court determined that respondent had alleged sufficient facts in his complaint to require the CIA to come forward with the reasons for respondent's discharge so that the court could undertake to balance respondent's interests against those of the CIA under the test of *Mt. Healthy City School District* v. *Doyle*, *supra*. The CIA then filed a renewed motion for summary judgment, revealing that respondent was dismissed because of insubordination, in that he refused to do any work while his grievance was pending, and also because, after respondent publicly disclosed his criticisms of the CIA,

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the personal damages liability of the CIA Director for exercising his authority to dismiss CIA personnel under 50 U.S.C. 403(c). The district court, whose decision was affirmed without opinion by the court of appeals, held that, despite the "enormous and vital responsibility" of the CIA Director, requiring "the firmest possible control of CIA personnel" (App. A, *infra*, 6a), the Director is not absolutely immune from personal liability for his decisions concerning the discharge of CIA employees. Although the court acknowledged that absolute immunity might be required where disclosure of classified information would be necessary to the Director's defense, such a distinction misconstrues the nature of absolute immunity, which provides a blanket protection from suit in certain classes of cases without requiring an ad hoc inquiry into the circumstances of each particular lawsuit. Moreover, the inevitable effect of the district court's unprecedented ruling would be to inhibit the CIA Director in the exercise of his important responsibilities to safeguard "the interests of the United States." 50 U.S.C. 403(c).

The question presented in this case is somewhat similar to that presented in *Nixon* v. *Fitzgerald*, cert. granted, No. 79-1738 (June 22, 1981), and *Harlow* v. *Fitzgerald*, cert. granted, No. 80-945 (June 22, 1981). The issue in those cases is whether the President and two of his senior advisors are absolutely immune from personal damages liability in an action alleging that their dismissal of a government agency

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the Agency was concerned that respondent would publicly release classified information in support of his position. The CIA's renewed motion for summary judgment is still pending.

employee was in retaliation for the employee's criticisms of the agency and hence violated the First Amendment. Although the decision in *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald* will not necessarily be controlling here, it may clarify the law with respect to the scope of official immunity of government officials for decisions in personnel matters, and thus may shed light on the proper resolution of the absolute immunity issue in this case. Accordingly, we believe that it would be appropriate for the Court to defer its disposition of this petition pending its decision in those cases.

1. Because of the uniquely sensitive functions of the Central Intelligence Agency and the special responsibilities that fall upon its Director (see *Snepp* v. *United States*, 444 U.S. 507, 512 n.7 (1980)), we submit that it is essential that the CIA Director have absolute immunity from personal damages liability for his exercise of authority under Section 403(c) in discharging CIA employees. In *Butz* v. *Economou*, 438 U.S. 478, 506-509 (1978), this Court reiterated the general rule that executive officials charged with constitutional violations should be accorded only a qualified immunity. The Court recognized, however, that there may be "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507 (footnote omitted). Citing *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the Court observed that "our decisions recognize that there are some officials whose special functions require a full exemption from liability." *Butz* v. *Economou*, *supra*, 438 U.S. at 508. In determining whether "full exemption from liability" is appropriate in a given case, the Court noted that it is necessary to conduct " ' a considered inquiry into the immunity historically ac-

corded the relevant official at common law and the interests behind it.'" *Ibid.*, quoting *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 421.

a. The Central Intelligence Agency and the position of CIA Director were not established until 1947. Consequently, there is no body of common law dealing with the immunity of the CIA Director. However, the position of CIA Director is closely analogous to military officers, who, under common law, traditionally were immune from suit for their official actions. See *Spalding* v. *Vilas*, 161 U.S. 483, 495-498 (1896); *Howard* v. *Lyons*, 360 U.S. 593 (1959). See also *Barr* v. *Matteo*, 360 U.S. 564, 582 (1959) (Warren, C.J., dissenting). Because military officers were accorded absolute immunity under the common law, it strongly suggests that the CIA Director—who is responsible for the delicate and sensitive business of gathering foreign intelligence in the interests of national security—should be entitled to claim such immunity.

b. Practical considerations also militate strongly in favor of granting absolute immunity to the Director of the CIA. In enacting 50 U.S.C. 403(c), Congress recognized the need to endow the CIA Director with the broadest discretion in deciding whether to discharge employees of the Agency. The statute authorizes the Director, in his discretion and notwithstanding any other law, to terminate the employment of any CIA employee whenever he deems such termination "necessary or advisable in the interests of the United States." This broad authority is the cornerstone of the CIA personnel system and is absolutely essential to ensure the effective conduct of the Agency's unique functions. In particular, the Director's authority under Section 403(c) is necessary to protect CIA activities and operations from employees who jeopardize the integrity or security

of those activities and operations. The statutory termination authority also provides the Director with the flexibility required to meet the constantly changing exigencies of foreign affairs and intelligence collection. The discretion that the Director exercises with respect to the termination of CIA employees "might be distorted if [his] immunity from damages arising from that decision was less than complete." *Butz* v. *Economou*, *supra*, 438 U.S. at 515. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423.

Unlike other government agency heads, the CIA Director will often exercise his termination authority on the basis of highly classified information that, so far as he knows at the time he acts, may never be available for public or judicial scrutiny. Thus, if the Director can prevail at trial only by proving his good faith and reasonableness under a qualified immunity defense (see *Scheuer* v. *Rhodes*, 416 U.S. 232, 238-239 (1974)), he must gamble, at the crucial time he makes his decision to discharge an employee under Section 403(c), that the information on which he acts will fortuitously cease to be sensitive to the national security, or that the government will find it to be in *its* best interests so to conclude at such time as he needs it in court. The chance of winning that gamble is slim because much information concerning CIA operations and the activities of CIA employees is classified or otherwise protected from release. See 50 U.S.C. 403(d)(3). The nation cannot permit its security to rest on the willingness of the CIA Director to take that gamble.

c. The district court observed that absolute immunity may be proper where the defense of constitutional tort suits would require the release of classified information (App. A, *infra*, 21a). However, the court concluded that absolute immunity was not available to petitioner here because both petitioner

and the CIA had acknowledged that this case involves no issue of secrecy or national security (*ibid.*). While petitioner and the CIA did acknowledge that respondent was not discharged for being a counter-spy—as may have happened to other CIA employees in the past or could happen in the future—neither petitioner nor the CIA conceded that this or any CIA employee termination case does not involve secret information or national security concerns. On the contrary, the discovery into and trial of any CIA matter would inevitably involve some information that is classified or otherwise protected from release by statute and would inevitably delve into areas that should not be made public. See *Totten* v. *United States*, 92 U.S. 105 (1875).

Even if this particular case involved no classified or otherwise protected information, petitioner, as the former Director of Central Intelligence, should still be accorded absolute immunity. Otherwise, if the availability of absolute immunity turned on whether classified information was involved, the decision to grant such immunity in a particular case could disclose the existence of, and thereby compromise, such information. Assume, for example, that the CIA Director were to receive confidential information that a CIA employee was providing classified data to an unfriendly foreign nation, and, accordingly, he were to discharge the employee without giving a reason or for a pretextual reason. If the employee chooses to litigate his discharge by alleging, like respondent, that he once complained about CIA personnel practices and hence that he was being punished for exercising his First Amendment rights, then the Director would be entitled to absolute immunity under the district court's theory, but only after revealing to the court that the case was "sensitive" or needed "special handling." By contrasting the treat-

ment afforded the Director in such a case with that afforded the Director in other cases where absolute immunity was not granted, a former employee (or other knowledgeable observers) could deduce that the employee's espionage activities (or some other classified reason) were the real reason for his discharge. Thus, the mere act of litigating CIA discharge cases under the district court's method of granting absolute immunity might require the exposure of the very classified information that the court was trying to protect when it recognized that absolute immunity should be available in "some" cases.[7]

In any event, the decision whether to grant absolute immunity to particular officials for certain actions is not, and should not be, made on a case-by-case basis. Rather, the decision should turn on whether, in a given class of cases, "absolute immunity is essential for the conduct of the public business." *Butz* v. *Economou*, *supra*, 438 U.S. at 507 (footnote omitted). Judges are not granted absolute immunity on a case-by-case basis dependent upon the degree to which their judicial functions may be interfered with in each particular case. They are granted immunity because *some* suits may interfere with

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[7] The courts have been confronted with a similar problem in suits brought against the CIA under the Freedom of Information Act, 5 U.S.C. 552, where either the admission or denial of the existence of documents or categories of documents would, by itself, disclose classified or otherwise statutorily protected information. The courts have resolved that problem by not requiring the CIA to highlight when a requestor has guessed correctly. See *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976). See also *Stein* v. *Department of Justice*, No. 79-1615 (7th Cir. Oct. 19, 1981); *Phillippi* v. *CIA*, 655 F.2d 1325, 1330-1331 (D.C. Cir. 1981); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

those judicial functions and because the mere threat of such suits would inhibit essential decision-making.

2. This is the first case in which the issue of absolute official immunity for the Director of the CIA has arisen. Consequently, there is not yet any conflict among the circuits on this issue. However, the general question of the scope of official immunity is an important and recurring one. As noted earlier, in *Nixon* v. *Fitzgerald, supra,* and *Harlow* v. *Fitzgerald, supra,* the Court is currently considering the issue of absolute immunity in an analogous context. Because the Court's decision in those cases is likely to clarify the principles of absolute immunity discussed in *Butz* v. *Economou, supra,* the Court may wish to defer disposition of this petition pending its decision in *Nixon* v. *Fitzgerald, supra,* and *Harlow* v. *Fitzgerald, supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1981

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2036

DONALD S. JORDAN, PLAINTIFF

v.

CENTRAL INTELLIGENCE AGENCY AND
ADMIRAL STANSFIELD TURNER, DEFENDANTS

[Filed Sept. 16, 1980]

MEMORANDUM

This case was brought by a former employee of the Central Intelligence Agency against his former employer and the Director of the Central Intelligence Agency, Admiral Stansfield Turner, in his official and individual capacities. Plaintiff alleges that he was discharged in violation of rights secured to him by the first and fifth amendments to the Constitution, by statute, CIA regulations, and the common law of contract.

I.

For twenty-six years, plaintiff was employed by the CIA in its Domestic Collection Division ("DCD"). During this period, he served as Deputy Chief of DCD offices in Denver, Seattle, and San Francisco. From 1974 until his dismissal on Decem-

ber 5, 1977, plaintiff served as Resident Officer in San Diego, California.

Plaintiff claims that his discharge from the CIA was due entirely to complaints about personnel practices that he made within the CIA and finally publicly over the years of his employment. On November 1, 1977, plaintiff's name appeared on a list of employees scheduled to be separated from the CIA on March 31, 1978. On November 15, 1977, in response to the inclusion of his name on the list, plaintiff sent to CIA Director Turner and also made public a telegram reiterating his complaints against certain CIA officials. Three weeks later, three CIA employees came to plaintiff's office and informed him that Director Turner had decided to terminate him immediately on account of the telegram. Thereafter, Director Turner directed the issuance of a press release purporting to explain plaintiff's discharge. Plaintiff claims that the press release was inaccurate, impugned his professional credibility and integrity, and handicapped his opportunity for other employment.

It is undisputed that defendants never afforded plaintiff a hearing or other process. Defendants commendably admitted that incorrect statements concerning plaintiff's discharge were made by a CIA representative to the press. Answer, filed December 20, 1979, at ¶ 26. Defendants deny, however, that their explanation of the discharge, albeit inaccurate, caused plaintiff any injury.

II.

Defendants' motion for summary judgment is narrowly drawn. The motion does not purport to address the specific reasons for the dismissal of the

plaintiff; defendants neither admit nor deny plaintiff's assertion that he was terminated because of his private criticisms of agency policy. Rather, the theme of defendants' motion is that for legal reasons and because of broad and basic concerns for the mission of the CIA, no court should scrutinize the Director's decision to terminate plaintiff's employment. Defendants contend that judicial review of employment decisions is precluded by statute, 50 U.S.C. § 403(c). They assert further that the reasons for plaintiff's discharge are irrelevant to their motion because plaintiff cannot show that interests protected by the first and fifth amendment [*sic*] were affected by the firing.

Upon consideration of defendants' motion, plaintiff's opposition, the oral argument and the record in this case, the Court concludes that the defendants' motion should be granted in part and denied in part. Plaintiff can demonstrate no fifth amendment liberty or property interest that was infringed by the conduct of the defendants. Accordingly, defendants' motion for summary judgment is granted on plaintiff's fifth amendment claims with respect to all defendants, including those sued in an individual capacity.

However, plaintiff is entitled to judicial review of his claim that his firing violated the statute governing termination of CIA employees. The Director's determination to terminate plaintiff's employment pursuant to 50 U.S.C. § 403(c) is subject to review for abuse of discretion. Defendants' motion for summary judgment on this claim must, therefore, be denied. As is more fully developed below, further development of the facts is necessary to determine whether Defendant Turner terminated plaintiff in retaliation for what he said, and, if so, whether such a determination was arbitrary and capricious.

There remains a dispute about facts material to plaintiff's first amendment claim. Accordingly, a further motion for summary judgment or trial is required to determine whether one or more defendants violated plaintiff's rights under the first amendment. The motion for summary judgment with respect to individual liability remains under advisement.

III.

A.

Statutory Cause of Action:

Defendants maintain that the statute which authorizes the Director to terminate a CIA employee precludes judicial review. That section, 50 U.S.C. § 403(c), provides in pertinent part that:

> Notwithstanding the provisions of section 652 of Title 5 [5 U.S.C. § 7501], or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

Section 403(c) clearly vests broad discretion in the Director to terminate CIA employees. *See Torpats* v. *McCone*, 112 U.S. App. D.C. 159, 300 F.2d 914, 915 (per curiam), *cert. denied*, 371 U.S. 886 (1962). But, the existence of such discretion does not itself preclude review. One section of the Administrative Procedure Act does state that "agency action [that] is committed to agency discretion by law" is exempt from judicial review, 5 U.S.C. § 701(a)(2). But another section states that judicial review is accessible in case of an abuse of that discretion. 5 U.S.C. § 706(2)(A). In addition, the Supreme Court has interpreted Section 701(a)(2) narrowly. *Citizens to*

Preserve Overton Park v. *Volpe*, 401 U.S. 402, 410 (1971). It has specifically stated, in *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970), that even a statute authorizing the Secretary of Agriculture "to carry out such regulations as he may deem proper" did not preclude judicial review because, as one commentator has written, "the power to prescribe such regulations as the administrator may deem desirable is still subject to the judicially enforceable rule of reason." B. Schwartz, *Administrative Law* at 610 (1976). Accordingly, this Circuit has repeatedly emphasized the narrowness of the statutory exemption from judicial review, *see, e.g.*, *Adams* v. *Richardson*, 480 F.2d 1159, 1161-62 (D.C. Cir. 1973), and has stressed that "[t]he Administrative Procedure Act . . . embodies a broad determination by Congress to subject the decisions of government agencies to review by the courts." *U.S. Lines* v. *Federal Maritime Commission*, 584 F.2d 519, 525 (D.C. Cir. 1978). Certainly, in a case such as this, where the plaintiffs claim that defendants have violated the law in the form of a statutory provision, CIA regulations, and, most important, the Constitution, federal officials such as defendants "cannot have discretion to behave unconstitutionally or outside the scope of [their] delegated authority." *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975). *See also Nguyen Da Yen* v. *Kissinger*, 528 F.2d 1194, 1199 (9th Cir. 1975); *Ralpho* v. *Bell*, 569 F.2d 607, 618-22 (D.C. Cir. 1977); *see generally* K.C. Davis, *Administrative Law of the Seventies* § 28.19 (1980 Supp.).

Moreover, nothing in section 403(c) specifically insulates the Director from review under the terms of the statute for abuse of discretion. This section

does state that the Director may terminate employment "[n]otwithstanding the provisions of section 652 of Title 5 [5 U.S.C. § 7501], or the provisions of any other law." But this language does not purport to oust courts of jurisdiction from review; it says nothing about judicial review.[1] Therefore it does not, by its terms, preclude such review, since the Supreme Court has held that " 'clear and convincing evidence' of a contrary legislative intent" is required to restrict access to judicial review of agency action. *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970), *citing Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

Furthermore, section 403(c) provides a standard for review. It states that CIA employees are terminable at will only if the Director deems that termination is "necessary or advisable in the interests of the United States." Obviously, a decision by the CIA Director as to what is "necessary or advisable in the interest of the United States" in the context of terminating a CIA employee must be given the greatest deference by reviewing courts. He has an enormous and vital responsibility. He needs the firmest possible control of CIA personnel. Courts called on to review a personnel decision raising constitutional questions obviously should be most circumspect in the discharge of their responsibility. If, for example, any inquiry on the merits of the reasons for dismissal would, by disclosure, impair some important national

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[1] It should be noted that 5 U.S.C. § 7501, referred to in this section, governs only the suspension or termination of federal employees. It does not touch on the question of judicial review. Specific reference to this provision thus further indicates that the language of section 403(c) is not intended to address the issue of judicial review.

interest, review might be inappropriate or require special procedures to protect security. *See In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

Defendants suggest that the interests of the United States require maximum secrecy about the CIA and that such secrecy could best be preserved by foreclosure of judicial review of agency personnel decisions. But neither the language nor the apparent intent of section 403(c) suggests that Congress intended to protect the secrecy of the CIA at all costs, or intended that the Director be the sole judge of the "interests of the United States" in all CIA personnel cases, even where the Constitution is implicated. The "interests of the United States" include not only national security matters in which the CIA has special responsibility, but also "the interests of the United States" in the defense and protection of its Constitution, an interest of the United States in which its courts have a special responsibility and experience. Nothing cited or argued by defendant establishes that Congress has relieved the courts of that responsibility in respect to a constitutional question relating to termination of a CIA employee. Thus, in light of the presumption in favor of judicial review of an agency action, *see Barlow* v. *Collins*, 397 U.S. at 166; *Jaimez-Revolla* v. *Bell*, 598 F.2d 243, 246 (D.C. Cir. 1979), the Court must conclude that Congress did not intend to foreclose judicial review of determinations made pursuant to 403(c). *See Torpats* v. *McCone, supra.*

Should defendants demonstrate that review of the merits and a statement of reasons or explanations may, in this case, contravene the intent of Congress in enacting section 403(c), then further consideration of specific facts and circumstances might be in-

appropriate. *See Peoples* v. *USDA*, 427 F.2d 561, 566 (D.C. Cir. 1970) (dictum). But in view of the constitutional aspects of plaintiff's contentions, which are, so far, uncontroverted by defendants, and defendants' pointed refusal to specify the reasons for plaintiff's firing or to assert any specific national security interests militating against further review, such a determination cannot now be made; summary judgment on plaintiff's claim for statutory review must be denied.

B.

Fifth Amendment Property Claim:

Plaintiff claims that his termination without due process violated a protected property interest in continued employment. A government employee who has a property interest in his job may not be deprived of it without due process of law. *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Such an entitlement may be found in the statute governing plaintiff's employment, agency regulations, or in mutually understood policies or understandings. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Mazaleski* v. *Treusdell*, 562 F.2d 701, 709 n. 23 (D.C. Cir. 1977). But plaintiff can demonstrate no such entitlement.

Plaintiff's claim to a statutory entitlement founders on the plain language of section 403(c). That provision, which bears repeating, provides that

> Notwithstanding the provisions of . . . any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.

50 U.S.C. § 403(c). The statute is clear that the Director has discretion to dismiss an employee for reasons having no relation to the employee's behavior or performance. The breadth of the Director's discretion specifically belies any reasonable, bilateral claim to a property interest in continued employment. *See Mazaleski* v. *Treusdell*, 562 F.2d at 709 n. 23; *Sims* v. *Fox*, 505 F.2d 857, 861 (5th Cir. 1974), *cert. denied*, 421 U.S. 1011 (1975).

Similarly, the applicable regulations, Headquarters regulation (HR) 20-28 and 20-27, expressly provide that an employee may be terminated (regardless of his performance) "when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States."

Plaintiff points to two agency documents that arguably support his claim to an entitlement. The first is a booklet providing general information to CIA personnel for use in answering questions of applicants and other outsiders. It provides in pertinent part, that:

> The Agency has the authority to separate involuntarily any employee who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively.

Attachment Z to Jordan Affidavit, January 17, 1980, at 3. A similar booklet, undated but apparently addressed to new CIA employees, states in part that:

> An employee may be separated involuntarily from the Agency if he does not perform his work satisfactorily, fails to qualify for Career Employee status after 3 years of Agency service, violates security measures and regulations, or conducts himself in an unsuitable manner.

> (Agency regulations specify the rights and the procedures that must be observed in any action taken to involuntarily separate an employee.)

Such handbooks, though not having the force of statute or regulation, may in some circumstances provide the basis for a protected entitlement. *Ashton* v. *Civiletti*, 613 F.2d 923, 929 (D.C. Cir. 1980). Nevertheless, in these circumstances, the assurances given by the booklets do not arouse sufficiently definite expectations to give rise to a property interest.

First, the booklets themselves do not purport to address the full scope of the agency's relations or authority over its employees. Indeed, the booklet identified as Attachment Z specifically disclaims any attempt to be "definitive [or] all inclusive." *See* Attachment Z, *supra*, at 1. Similarly, the document identified as Attachment AA expressly incorporates regulations that on their face indicate that an employee may be dismissed for reasons having no relation to the employee's performance. By contrast, in *Ashton*, the Court of Appeals analyzed an official Handbook for non-investigative employees, which was given to each new employee when he began work. *See* 613 F.2d at 929.

Second, the documents cited by plaintiff, while suggestive, are hardly free from ambiguity. They do not purport to outline all the circumstances in which an employee may be terminated, nor exclude others by negative implication. In *Ashton*, the Handbook provision relied upon stated unequivocally that

> You may assume that your position is secure, if you continue to do satisfactory work.

613 F.2d at 929. In view of the clear language of the regulations, no promise of continued employment

may be inferred from the documents relied upon by plaintiffs. *See Mazaleski* v. *Treusdell*, 562 F.2d at 709 n. 23.[2]

Fifth Amendment Liberty Claim:

Plaintiff maintains that the circumstances of his discharge so foreclose his opportunities for future employment as to constitute a denial of liberty without due process. An attack by the Government on an individual's reputation may, in some circumstances, constitute a denial of liberty sufficient to justify due process protection. *Board of Regents* v. *Roth*, 408 U.S. at 573; *Mazaleski* v. *Treusdell*, 562 F.2d at 711. However, not every infringement on an individual's reputation or employment prospects rises to the level of a constitutional deprivation. To trigger protection of due process, the government action must (a) make some accusation of immorality or dishonesty against the employee, *see Board of Regents* v. *Roth*, 408 U.S. 573-74; *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436-37 (1971); or, (b) raise some legal or practical obstacle that would "foreclos[e] his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth*, 408 U.S. at 573; *Mazaleski* v. *Treusdell*, 562 F.2d at 713.

In this case, there can be no serious allegation that plaintiff's reputation has been seriously stained. It is admitted by defendants that upon dismissing plaintiff, defendant Turner issued a press release

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[2] In view of the facts adduced by defendants tending to show that plaintiff has no property interest in his employment, plaintiff's bare allegation that there existed an "understanding" relating to his employment with the agency is not sufficient to defeat a motion for summary judgment. *See* Rule 56(e), Fed. R. Civ. P.

that included inaccurate statements about the reason for his discharge, specifically that plaintiff had demanded that two of his superiors be fired. *See* Answer, ¶ 26; Affidavit of Donald Jordan, Attachment BB. Yet there has been no showing that this statement accused plaintiff of dishonesty, immorality, or mental instability. Absent such stigma, no liberty interest can be said to be implicated. *See Wisconsin* v. *Constantineau*, 400 U.S. at 436-37. Thus, in *Mazaleski* v. *Treusdell*, where dismissal of a government employee was accompanied by disclosure that one of the grounds for dismissal was "insubordination," the Court of Appeals found no damage of a constitutional stature to plaintiff's reputation. *See* 562 F.2d at 712 & n. 28. This precedent is controlling here.

Nor can it reasonably be said that plaintiff's job opportunities have been foreclosed by his dismissal. Indeed, section 403(c), far from imposing any legal impediment on future employment, actually imposes a duty on other agencies and departments not to allow plaintiff's termination to affect his right to seek or accept employment with them, if he is declared eligible for such employment by the Civil Service Commission. 50 U.S.C. § 403(c). It is uncontroverted that plaintiff's record with the CIA indicates only that he was terminated "pursuant to statutory authority," and that no requests for information relative to plaintiff have been received from prospective employers. Affidavit of Clifford D. May, attached to Defendants' Motion for Summary Judgment, February 13, 1980.

Plaintiff supports his allegation that he has been prevented from finding further employment by his own affidavit stating that he has not sought employ-

ment "because of my belief that the circumstances of my termination, and particularly, the statements by defendant Turner to the media, which he has now admitted are false . . . effectively preclude suitable employment." Affidavit of Donald Jordan, January 17, 1980, at ¶ 35. The Court must make an independent evaluation of whether the circumstances identified by the plaintiff constitute a deprivation of liberty by foreclosing employment opportunities. Although Jordan's dismissal may be a disadvantage or impediment to future employment, it does not foreclose all other employment possibilities to the extent necessary to infringe a constitutional right. *See Board of Regents* v. *Roth*, 408 U.S. at 573; *Mazaleski* v. *Treusdell*, 562 F.2d at 713. The law of this Circuit requires a substantial showing that future employment opportunities have been destroyed before finding an infringement of a constitutionally-protected liberty interest. There can be no reasonable dispute that the defendants' conduct, including the inaccurate statements by the CIA representative did not rise to this level.[3] While plaintiff has no duty to seek other employment, he would have had a much better claim had he tried in good faith and failed because of inferences drawn by prospective employers from his CIA termination. Where, as here, the

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[3] Plaintiff alleges that because he was accused, incorrectly, of urging the dismissal of his superiors, a prospective employer could have no confidence in him. However, the telegram that plaintiff publicly released accuses the same superiors of specific acts of misconduct. An employer sensitive to a potentially critical employee would in all likelihood be as reluctant to hire a person who has criticized his former superiors of misconduct as one who called for the dismissal of his superiors. It is difficult to see, therefore, how any additional disability or obstacle was imposed on plaintiff by the inaccurate statements.

facts and circumstances do not give rise to a finding that a protected liberty interest has been infringed, plaintiff cannot conjure one by asserting a "belief" that employment has been precluded.

D.

First Amendment Claim:

Plaintiff claims that he was fired in retaliation for public and private criticisms of agency personnel practices protected by the first amendment. It is established that in certain circumstances, the first amendment guarantees of free speech protect public employees from retaliation for public [4] and private [5] speech.

In their motion for summary judgment, defendants focus only on the publicly released telegram. They do not admit, but neither do they dispute, that plaintiff's private remarks affected their decision. The Court assumes, for the purpose of this motion, that plaintiff's private criticisms were protected by the first amendment. In support of their motion, defendants assert *first* that the telegram was not protected speech because of the nature of its contents and the circumstances of plaintiff's employment, *see generally Snepp* v. *U.S.*, 48 U.S.L.W. 3527 (February 19, 1980) (per curiam); and, second, that the public release of the telegram was sufficient to justify plaintiff's termination. Accordingly, they argue, neither the character of plaintiff's private speech nor

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[4] *See* Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).

[5] *See* Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Hanson v. Hoffman, No. 78-1436 (D.C. Cir. February 7, 1980).

the actual reason for his discharge are relevant. Indeed, defendants have conceded (for the purpose of this motion only) that plaintiff's private criticisms were the cause-in-fact of the decision to terminate him. They argue, however, that because his discharge would have been justified on the basis of the assertedly unprotected telegram, plaintiff cannot claim a violation of constitutionally protected interests.

Defendants' syllogism rests upon an extreme interpretation of the rule of causation laid down by the Supreme Court in *Mt. Healthy* and elaborated in *Givhan*. In *Mt. Healthy*, the Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial" part in the decision to fire him. 429 U.S. at 285. Instead, the Court held that once an employee has shown that his protected conduct played a "substantial" role in the decision to fire him, the employer is permitted to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." 429 U.S. at 287; *see also Givhan* v. *Western Line Consolidated School District*, 439 U.S. at 697; Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 Yale L.J. 376, 383-84 (1980).

Defendants interpret the *Mt. Healthy* test to require only that they show that a firing for reasons other than protected speech was *justified*, not that they would *in fact* have fired the plaintiff irrespective of his protected speech. Although this distinction is subtle, it is crucial in these circumstances. If defendants are correct, they need never articulate

the actual reasons for firing plaintiff or prove that they would have fired him, but need only point to a sufficient cause to fire him. This interpretation is in error.

To begin with, if defendants are correct, the Court in *Mt. Healthy* would necessarily have reached a contrary result. The plaintiff there lacked tenure and there was not even a state law requirement of cause or reason before a decision could be made not to continue his employment. *See* 429 U.S. at 285. Justification or authority to fire the plaintiff was thus always present. Accordingly, if the Supreme Court intended that the employer need only show a basis for dismissal, rather than what the employer would have done, a remand would not have been necessary, since it could only have been for the purpose of inquiring into what the employer would in fact have done but for the protected conduct. *See* 429 U.S. at 576.

This interpretation was confirmed in *Givhan*. There in stating the nature of the failure of proof in the trial court, the Supreme Court quoted with approval the opinion of the Court of Appeals, which concluded:

> The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the [protected speech]. Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. . . . Therefore [respondents] failed to

make a successful "same decision anyway" defense.

555 F.2d at 1315, *quoted at* 99 S. Ct. at 693.

This interpretation is consistent with the purpose of the "but for" test of *Mt. Healthy*. The Supreme Court there rejected a rule requiring reinstatement whenever protected speech was found to be a substantial cause of a termination because such a rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285. In adding the "but for" test, the Court expressed its concern that a substantial cause rule alone could create an incentive for a marginal or substandard employee to engage in protected speech in order to secure his position. *See* 429 U.S. at 286; Note, *supra*, 89 Yale L.J. at 385-86. The interpretation proposed by the defendants would reach far beyond this purpose of avoiding plaintiff windfalls to create an incentive for the employer to trump up hypothetical justifications for discharge that did not or would not have caused him to fire an employee but for the exercise of protected rights of speech. There is nothing in *Mt. Healthy* that would support such an extreme view.

At oral argument, defendants suggested that however *Mt. Healthy* is interpreted generally, a special exception should be made for CIA employees because of the national security concerns inherent in judicial review of CIA personnel decisions. According to the defendants, the requirement that they show by a preponderance of the evidence that they would have discharged the plaintiff but for his protected speech would expose them in the future to what they termed

"greymail"—that is, the agency might be coerced to retain an employee who had engaged in protected speech merely to avoid stating the actual reasons for his discharge, which might involve sensitive security issues.

Defendants have not, however, demonstrated that the risk of "greymail" cannot be minimized by the devices such as the assertion of executive privilege, *see United States* v. *Reynolds*, 345 U.S. 1 (1952), *in camera* review, protective orders, or similar procedures carefully tailored to the particular circumstances.[6] Nothing in the record here or in relevant court decisions supports a conclusion that the interests of the CIA in maximizing the secrecy of its operations require the plaintiff to forego all first amendment rights guaranteed other public employees. To permit the *Mt. Healthy* burden to be carried by a determination that an alternative justification for dismissal exists—where the Director has almost complete discretion to find such a justification[7]—would have that effect. If such an exception

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[6] Indeed, had plaintiff sought the employment records relating to his dismissal pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, the CIA would not be permitted to urge a blanket exemption from compliance. Rather, the CIA would be required to submit an affidavit detailing the basis of a claim of exemption. Only upon a showing that disclosure in that specific case would lead to the unauthorized disclosure of intelligence sources would an exemption be granted. *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976). Plaintiff does not contest that an affidavit addressed to the circumstances of the particular case would be sufficient to avoid disclosure of documents that the CIA determines to be sensitive. *See Weissman* v. *Central Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977).

[7] See the discussion of 50 U.S.C. § 403(c), *supra*.

to *Mt. Healthy* is to be fashioned in aid of CIA secrecy, it should be created on the basis of a fuller record than has been developed here.

Accordingly, summary judgment at this stage is not appropriate. Viewing the facts in the light most favorable to the plaintiff, who is not the moving party, it is assumed for the purposes of this motion that the private criticisms voiced by the defendant were protected by the first amendment. Defendants' silence on why plaintiff was dismissed, or whether he *would* have been dismissed but for this speech prevents them from carrying their burden of showing, by a preponderance of the evidence, that plaintiff would not have been fired but for his protected conduct.[8] *See Mt. Healthy City School District* v. *Doyle*, 429 U.S. at 287.

Nor will the Court at this time rule on whether plaintiff's private criticisms or public telegram were protected by the first amendment. Such a determination raises difficult issues of fact relating to the circumstances of the speech, the nature of plaintiff's employment, and the employer's need for secrecy, etc. *See Hanson* v. *Hoffman*, *supra*, slip op. at 18. These issues cannot be addressed on the scanty record now before the Court. *See Hanson* v. *Hoffman*, *supra*, slip op. at 19; *Avrech* v. *Secretary of Navy*, 520 F.2d 100, 105 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *Ring* v. *Schlesinger*, 502 F.2d 479,

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[8] At oral argument on defendants' motion, the Court offered defendants an opportunity to articulate the actual reasons for plaintiff's dismissal. By Memorandum to the Court, March 17, 1980, defendants declined to state any reasons. Accordingly, substantial doubts about the reasons for and motive behind plaintiff's dismissal remain. Whether the issues raised here can be resolved by further affidavit by defendant Turner remains to be determined. *See Mazeleski* v. *Treusdell*, 562 F.2d at 717.

489-90 (D.C. Cir. 1974). In declining to rule at this stage, the Court does not intend to foreclose the possibility that by carefully drawn, unambiguous agreements between the agency and its employees, an employee may waive first amendment protection for public and private statements about the CIA. *See Snepp* v. *United States, supra.* Whether the present agreement between plaintiff and the CIA will have this effect remains to be determined.

In order to limit the scope of the Court's inquiry into internal CIA affairs, and to limit also the breadth of this Court's constitutional determinations, the next step in adjudication of this matter will deal with whether plaintiff would have been discharged but for his private speech. If so, then the Court's inquiry will be limited to whether the publicly released telegram was speech protected by the first amendment. If not, then the status of the telegram need not be addressed and the inquiry limited to the status of plaintiff's private criticisms.

IV.

It remains to be determined whether defendant Turner may be personally liable to plaintiff for the alleged violations of his constitutional rights. Since the decision of the Supreme Court in *Davis* v. *Passman*, 99 S. Ct. 2264 (1979), and the earlier decision of our Court of Appeals in *Dellums* v. *Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977) there can be no doubt that a private right of action against a public official can be implied for a violation of rights secured by the first amendment. *Harper* v. *Blumenthal*, 478 F. Supp. 176 (D.D.C. 1979). In view of the fact that this Court has found that plaintiff has suffered no infringement of rights guaranteed by the fifth amendment, defendant Turner is entitled to

partial summary judgment on the claims arising from these alleged intrusions.

Defendant Turner suggests, however, that even if a cause of action lies under the first amendment, he is entitled to absolute immunity for acts committed in the course of his official responsibilities. The Supreme Court has recently made clear that absolute, rather than qualified, immunity is available only in very narrow circumstances; an official "must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). In recognizing absolute immunity for judges, prosecutors, and officers having related functions, the court indicated that officials can claim absolute immunity only when it is "essential for the conduct of the public business." 438 U.S. at 507.

Defendant Turner suggests that such exceptional circumstances are present here, because the Director of the CIA will often be unable to defend an action against himself without resort to classified information. At the same time, the defendants have acknowledged that this case involves no such issue of secrecy or security. Where defense of a constitutional tort action requires the disclosure of classified information, absolute immunity may be proper. That question, however, must be left to the appropriate case; the possibility of such a dilemma does not satisfy the high standard set forth in *Butz* v. *Economou* for the grant of absolute immunity in all circumstances.[9]

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[9] An additional factor to be weighed in considering whether absolute immunity is appropriate is the availability of administrative remedies. *See Butz* v. *Economou*, 99 S. Ct. at 2914-15. CIA regulations permit discharge without any hearings.

Because of the nature of the test for qualified immunity, the issue of whether defendant Turner is immune from liability cannot now be resolved. To satisfy the standard of qualified immunity, an official must demonstrate both that he had a good faith belief in the propriety of his actions, *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974), and that the action was objectively reasonable in light of information available at the time of a decision. *Wood* v. *Strickland*, 420 U.S. 308, 320-322 (1975).

Butz v. *Economou* counsels that such determinations should be made, where possible, at summary judgment. Here, however, summary judgment is not appropriate at this time. Defendants have conceded that a CIA representative made inaccurate statements about the reasons for plaintiff's dismissal at the time he was discharged. If defendant Turner had a role in such inaccurate statements, this, alone, may raise a question about possible reprisal for exercise of first amendment rights, requiring further development of the underlying facts. Moreover, defendants have pointedly refused even to specify the reasons for plaintiff's discharge. Where such pivotal facts remain in dispute, summary judgment is at least premature. *Harper* v. *Blumenthal*, 478 F. Supp. at 184. It may be that further proceedings will determine that there is no claim on the merits, in which event the question of Director Turner's personal liability will become moot. If not, there would remain for consideration the extent and nature of his personal responsibility for the inaccurate statements and the alleged violation of plaintiff's first amendment rights. In light of *Butz* v. *Economou*, Admiral Turner will be afforded a further opportunity to deal

with his individual liability in a summary judgment mode.

V.

Both the question of statutory review pursuant to 50 U.S.C. § 403(c) and the scope of constitutional review under the first amendment raise difficult and unsettled questions of law. The resolution of these issues in plaintiff's favor raises the prospect of trial on the merits and the corollary possibility of claims of privilege by the defendants arising out the CIA's needs for protecting the secrecy of its operation. Before the Court and the parties embark on such a course, defendants ought to have an opportunity for appellate review pursuant to 28 U.S.C. § 1292(b). Accordingly, by accompanying order, the Court will schedule a conference to afford the parties an opportunity to request that the questions of review under the first and fifth amendments and section 403(c) be certified for interlocutory appellate review, or proceed to final disposition.

/s/ Louis F. Oberdorfer
United States District Judge

Date: Sept. 16, 1980

APPENDIX B

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 78-02036

No. 80-2396

DONALD S. JORDAN

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., APPELLANTS

[Filed Jun. 12, 1981]

Appeal from the United States District Court
for the District of Columbia

Before: TAMM, ROBB and EDWARDS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing. It is ordered and adjudged by this Court that the judgment of the

District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2036

DONALD S. JORDAN, PLAINTIFF

v.

CENTRAL INTELLIGENCE AGENCY and
ADMIRAL STANSFIELD TURNER, DEFENDANTS

[Filed Sep. 16, 1980]

ORDER AND JUDGMENT

For the reasons stated in the accompanying Memorandum, it is this 16th day of September, 1980, hereby

ORDERED AND ADJUDGED: That defendants' motion for summary judgment as to plaintiff's claims arising under the fifth amendment is GRANTED and JUDGMENT is entered in defendants' behalf in both their official and individual capacities; and it is

FURTHER ORDERED: That defendants' motion for summary judgment as to plaintiff's claims arising under 50 U.S.C. § 403(c) is DENIED; and it is

FURTHER ORDERED: That defendants' motion for summary judgment as to plaintiff's claims, arising under the first amendment against defendants in their official capacities is DENIED; and it is

FURTHER ORDERED: That defendant Turner's motion for summary judgment as to plaintiff's claim against him individually arising under the first amendment remains under advisement; and it is

FURTHER ORDERED: That a status conference will be held on September 25, 1980, at 9:30 a.m., in Courtroom No. 3, U.S. Courthouse, for the purpose of scheduling further proceedings in this case.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2036

DONALD S. JORDAN, PLAINTIFF
v.

CENTRAL INTELLIGENCE AGENCY and
ADMIRAL STANSFIELD TURNER, DEFENDANTS

[Filed Nov. 18, 1980]

ORDER

In the memorandum of September 16, 1980, denying in part and granting in part defendants' motion for summary judgment in this case, the court indicated that, in light of the difficult and unsettled questions of law raised by the questions of review under the first and fifth amendment [*sic*] and 50 U.S.C. § 403(c), it intended to afford the parties an opportunity to request that these questions be certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b). On November 14, 1980, defendants filed a Notice of Appeal without any request for such certification. In the interest of judicial economy, the court concludes *sua sponte* that it should certify the issues *nunc pro tunc* as potentially controlling questions of law. Accordingly, it is, this 17th day of November, 1980, hereby

ORDERED: That the court, being of the opinion that its order of September 16, 1980, involves con-

trolling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, hereby certifies the questions decided in that order for interlocutory appellate review, *nunc pro tunc* November 13, 1980, pursuant to 28 U.S.C. § 1292(b).

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-02036

September Term, 1980

No. 80-8031

CENTRAL INTELLIGENCE AGENCY and ADMIRAL STANSFIELD TURNER, PETITIONERS

v.

DONALD S. JORDAN, RESPONDENT

[Filed Mar. 30, 1981]

BEFORE: McGowan *, Chief Judge, Wright and Wilkey, Circuit Judges

ORDER

On consideration of petitioner's memorandum in support of its petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), and the opposition thereto, and it appearing that the issues certified are not yet in a posture to be reviewed on appeal, it is hereby

ORDERED by the Court that the petition for permission to appeal is denied.

Per Curiam

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* Chief Judge McGowan did not participate in this order.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 78-02036

No. 80-2396

DONALD S. JORDAN

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., APPELLANTS

[Filed Mar. 30, 1981]

BEFORE: McGowan, Chief Judge *, Wright and Wilkey, Circuit Judges.

ORDER

Appellee Donald S. Jordan filed a motion to dismiss the appeal in this case for want of a final order. The appellants argued that this appeal is properly before this Court pursuant to 28 U.S.C. § 1291, as an appeal from a final collateral order of the District Court. Only the District Court's denial of absolute official immunity is appealable as a final collateral order under § 1291. Accordingly, it is hereby

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* Chief Judge McGowan did not participate in this order.

ORDERED by the Court that the motion to dismiss is denied insofar as it concerns the issue of Admiral Turner's absolute immunity from suit. In all other respects, the motion to dismiss is granted. It is

FURTHER ORDERED by the Court that this appeal is to be expedited. The Clerk is directed to calendar this case for the May-June sitting of this Court. This Court's order of February 19, 1981 is vacated. The following briefing schedule shall apply, with no extensions of time to be granted:

Appellant's brief—April 17, 1981

Appellee's brief—May 8, 1981

Reply brief and joint appendix—May 15, 1981

Per Curiam

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Opposition

Office - Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS
CLERK

No. 81-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ADMIRAL STANSFIELD TURNER,
Petitioner

v.

DONALD S. JORDAN,
Respondent

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

RICHARD B. SOBOL
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Attorney for Respondent

Dated: December 3, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-872

ADMIRAL STANSFIELD TURNER,
Petitioner

v.

DONALD S. JORDAN,
Respondent

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent concurs in petitioner's suggestion (Petition, pp. 8, 13) that consideration of the Petition in this matter be deferred pending a decision by the Court in *Nixon* v. *Fitzgerald*, No. 79-1938 (Argued November 30, 1981), and *Harlow* v. *Fitzgerald*, No. 80-945 (Argued November 30, 1981). Respondent requests the opportunity to file an Opposition to the Petition thirty days after the decision in those cases.

The issue in this case is whether the Director of Intelligence is absolutely immune from personal damages liability arising out of the discharge of a CIA employee allegedly in violation of his First Amendment rights. The issue in the *Fitzgerald* cases is whether the President of the United States and two of his senior advisors are ab-

solutely immune from personal damages liability arising out of the discharge of a government employee allegedly in violation of his First Amendment rights. The decision in the *Fitzgerald* cases will undoubtedly bear on the question of whether certiorari should be granted in this case. It is for this reason that respondent concurs in the suggestion of deferral of consideration, and requests the opportunity to file an Opposition to the Petition following the decision in the *Fitzgerald* cases.

Respectfully submitted,

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Dated: December 3, 1981